No. 86-666

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Petitioners,

v.

WHITWORTH BROS. STORAGE COMPANY,
Respondent.

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CROSS PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Is an employer suing on behalf of co-owner employees a "participant" in a plan under § 502a of ERISA, when the employer mistakenly contributed money on behalf of the employees who turn out to be ineligible for pension benefits from those payments, and may such employer sue to recover the mistakenly made payments, which the plan is permitted to refund under § 403(c)(2)(A)(ii), when the plan arbitrarily and capriciously refused to refund the money?

(2) Did Congress imply that an employer, who mistakenly contributed money on behalf of employees, can sue for restitution of that money when the plan

arbitrarily and capriciously refuses to return the mistaken contributions, by Congress' specific recognition that ERISA S 403(c)(1) "shall not prohibit the return of such [mistakenly paid] contributions?" (ERISA § 403(c)(2)(A)(ii).

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The cross petitioner, Whitworth Bros. Storage Company (Whitworth or Whitworth Bros.) respectfully prays that a writ of certiorari issue to review that part of the judgment and opinion of the United States Court of Appeals for the Sixth

Circuit entered in the captioned proceedings on June 25, 1986, designated as "A" (pages 5a - 13a) and "B" (pages 13a - 22a) of the opinion in Appendix to Petition. The Sixth Circuit held: "A" - that Whitworth has no express cause of action under § 502 ERISA; and "B" - that Whitworth has no implied right of action pursuant to § 403 ERISA.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 749 F.2d 221. That opinion and the District Court's memorandum and orders are both reprinted in appendix to Central States' petition, respectively at pages 1a - 28a and 29a - 32a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 25, 1986. The Court of Appeals denied a timely petition for rehearing en banc on August 26, 1986. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1) by Petitioner. This Cross Petition for Certiorari is filed under Rule 19.5 of the Supreme Court. The Petition for Certiorari was received by counsel for Respondent on September 24, 1986.

STATUTORY PROVISIONS INVOLVED

The statutes, or parts thereof, involved in this case are the Employee Retirement Income Security Act of 1974 ("ERISA"),

P.L. 93-406, 88 Stat. 832 (1974) and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, 94 Stat. 1208 (1980). Specifically, ERISA section 403(c)(2)(A) provided, before its 1980 amendment in MPPAA:

> "In the case of a contribution which is made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution."
> 88 Stat. at 876.

As amended, in 1980, (by section 410 of MPPAA, 94 Stat. at 1380) it provides in pertinent part:

> "In the case of a contribution, or payment of withdrawal liability under part 1 subtitle E of part iv--...
>
> (ii) made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan

> is described in section 401(a) of the Internal Revenue Code of 1954 or the trust which is part of such plan is exempt from taxation under section 501(a) of such Code, paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake."

This section is set out in its entirety in Appendix hereto, page 1a. It is codified at 29 U.S.C. Section 1103(c)(2)(A).

Additionally, ERISA Section 502(a), 29 U.S.C. Section 1132(a), provides, in pertinent part:

> "(a) A civil action may be brought--
>
> (1) by a participant or beneficiary--. . ."

This section is set out in its entirety together with relevant 29 U.S.C. § 1002 in the Appendix hereto, pages 2a - 3a.

Other relevant statutes are included in

the Appendix to Central States' Petition, and together with the above are:

ERISA § 403(c)(1), 29 U.S.C. § 1103 (c)(1);
ERISA § 403(c)(2)(A)(ii), 29 U.S.C. § 1103(c)(2)(A)(ii);
ERISA § 502(a), 29 U.S.C. § 1132(a);
ERISA § 514(a), 29 U.S.C. § 1144(a).

STATEMENT OF THE CASE

William and Ernest Whitworth were and are co-owners and employees of Whitworth Bros. Storage Company (Whitworth Bros.) (Complaint, Paragraph 6). From 1955 to 1980 for William and from 1955 to 1981 for Ernest, Whitworth Bros. made employer contributions to Central States, Southeast and Southwest Areas Pension Fund (Central States), mistakenly thinking that William

and Ernest were employees covered by the Collective Bargaining Agreement. (Complaint, Paragraphs 11 and 19). Had William and Ernest been employees and not employee owners they would have been entitled to a pension from their contribution. Discovering the mistake, Whitworth Bros. requested that Central States return the money mistakenly contributed on behalf of William (Complaint, Paragraphs 11 and 20). The amounts contributed on behalf of William and Ernest were approximately $9,000 from 1955 through 1974 and $11,000 from 1975, the effective date of ERISA, through 1980 for William and 1981 for Ernest (Complaint, Paragraphs 10 and 19). Central States refused to return most of

the money contributed on behalf of William, but did return the money contributed on behalf of him from November 11, 1979 through March 1, 1980, less than four months of contributions out of 25 years of contributions. (Complaint, Paragraphs 12 and 20). Despite the fact that neither William nor Ernest are eligible to receive a pension because they are co-owner-employees, and despite the fact that Central States has refused to return most of the money contributed on behalf of William, the Central States continued to bill Whitworth Bros. from August, 1981 through May, 1983 for $1,701.86 for Whitworth Bros.' contribution on behalf of Ernest and threatened

Whitworth Bros. with legal action or collection proceedings if payment were not made (Complaint, Paragraphs 26 and 27).

Alleging that Central States' refusal to return the Whitworth Bros.' contribution on behalf of William pursuant to 29 U.S.C. § 1103(c)(2)(A)(ii) is arbitrary and capricious and violates Central States' fiduciary duties under ERISA and 29 U.S.C. § 1104(a), Whitworth Bros. sued Central States in Federal District Court for return of the money. Return of the money contributed by mistake since 1975 the effective date of ERISA was sought pursuant to federal law under ERISA, Count One; return of money prior to 1975 was sought pursuant to a pendent

state cause of action, Complaint, Count Two; Whitworth Bros. also sought a declaratory judgment that it does not have to make contributions that will not result in a pension and which Central States may not voluntarily return on behalf of Ernest, Complaint, Count Three.

Central States moved to dismiss the Complaint for lack of jurisdiction or failure to state a claim under Federal Rule 12(B)(1) or 6. The District Court granted the motion (Page 29 in Appendix to Petition).[1]

The Court of Appeals for the Sixth Circuit considered three bases as to

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[1]These three paragraphs are also reprinted in the Brief in Opposition.

whether the District Court had jurisdiction of Whitworth's claim; (1) as an express action authorized in ERISA; (2) as an action implied from the terms of the statute; (3) as an action arising under federal common law. The court found in the negative on points (1) and (2) and affirmatively on point (3). It is on points (1) and (2) that Respondent Whitworth here seeks certiorari.

REASONS FOR GRANTING THE WRIT

Denial of an explicit or implied cause of action to an employer such as Whitworth will serve to: discourage pension plan growth in the long run; deprive the employer of property mistakenly paid on behalf of employees; encourage plans to seek money to which they are not entitled; and unjustly

impoverish the employees on whose behalf the money was paid and who turn out not to be eligible for a pension because they are owner-employees.

I. AFFIRMATIVE RESOLUTION OF QUESTION I (EXISTENCE OF EXPRESS REMEDY) COULD OBVIATE NEED TO USE AN IMPLIED RIGHT OF ACTION OR FEDERAL COMMON LAW

The most straight forward resolution of all of the issues in this case is the recognition that an employer who mistakenly contributes money to a plan on behalf of employees is a "participant" in the plan to the extent that the employer's money for the employees is in the plan. A "participant" is specifically authorized to bring suit under Section 502a to "recover benefits due him". Section 403(c)(2)(A)(ii) expressly permits the plan to refund the employers mistaken contributions. Thus the employer is suing on

behalf of the employees for whom it contributes money to obtain for them the benefit of the return of money to which they are entitled.

In contrast to the holding of the Sixth Circuit in this case, one circuit has held that owner-operators might be considered "participants" under Section 502 and could sue for restitution of money mistakenly paid into the plan. Chase v. Trustees of Western Conference of Teamsters Pension Trust Fund, 753 F.2d 744 (9th Cir. 1985). See Note 13 in the Sixth Circuit Opinion in this case at page 17a of the appendix to Central States' Petition (herein "petition"). The Ninth

Circuit earlier allowed an employer's suit.[2]

Congress had no need to specify that an employer can sue in this instance because it has already specified that a "participant" can sue. In this instance the employer (Whitworth Bros.) is not suing as an employer to obtain money for corporate use, but on behalf of the employee-co-owners (Whitworth brothers) to return to them their money paid on the mistaken belief that they, as employees were covered by the Collective Bargaining Agreement. Complaint, Paragraphs 10 and 19. If the employees (Whitworth brothers) had been so covered, they would

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[2] Chase cited with approval in Award Service Inc. v. N. California Retail Clubs Union, 763 F2d. 1066, 1068 (9th Cir. 1985). cf. In Peckham v. Board of Trustees, et al., 719 F.2d 1063 (10th Cir. 1983), self-employed union members were allowed to recover contributions mistakenly paid on their own behalf; Fentron Indus. v. Nat'l. Shopmen Fund, 674 F.2d 1300 (9th Cir. 1982).

have been entitled to a pension. Since they are not, the employer (Whitworth Bros.) who made the contributions on their behalf has mistakenly participated in the plan. It should be able to sue, as a participant, under Section 502(a) to obtain restitution of the money for the employees as provided by Section 403 (c)(2)(A)(ii). This will prevent unjust enrichment, because the plan has no pension obligations to Whitworth brothers; and this will prevent the plan from seek-into to collect more money to which it is not entitled with the thought that it will never have to return it.

II. AFFIRMATIVE RESOLUTION OF QUESTION 2 THAT THERE IS AN IMPLIED CAUSE OF ACTION WOULD CORRECTLY RESOLVE A CONFLICT IN THE CIRCUITS

There is a conflict among several circuit

courts of appeals and among district courts on the issue of "implied cause of action".

The Ninth Circuit Court of Appeals, contrary to the Court below has ruled that an employer has an implied cause of action under ERISA § 403 to recover mistakenly paid contributions. Award Service, Inc. v. Northern California Retail Clerks Unions, 763 F.2d 1066 (1985), cert. denied (Jan. 1986, 106, S.Ct. 850). Construing § 403(c)(2)(A)(ii), the Court held, at page 1068:

> "Section 403 confers no such right expressly; it merely permits the return of contributions mistakenly paid. We conclude, however, that a right of action is properly implied by section 403 under the standard of Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975). First, the 1980 amendment to section 403(c)(2)(A),

> which added subparagraph (ii) concerning payments made by an employer by mistake of fact or law, was clearly designed for the benefit of employers. Multi-Employer Pension Plan Amendments Act of 1980, Pub.L. No. 96-364, § 310, 94 Stat. 1208, 1296 (1980). Second, a congressional intent to create a private remedy in favor of the employer is implicit in Section 403(c)(2)(A)(ii). Without such a remedy, the decision to return contributions mistakenly paid would be left solely to the interested trustee. Third, implying a private right of action furthers the congressional scheme of permitting restitution of contributions paid by mistake when equitable factors militate in favor of such restitution. Finally, no principle of federal-state comity renders a federal cause of action inappropriate; Congress preempted all state law regarding employee pension benefits effective with contributions made after January 1, 1975. 29 U.S.C. § 1144(a);" (emphasis added)

The subsequently decided Supreme Court case of Massachusetts Mutual Life Ins. Co. v. Russell, 105 S.Ct. 3085 (1985)

was discussed by the Ninth Circuit in a ruling on Motion to Recall Mandate. In the Massachusetts Mutual case, this Court refused to imply a remedy in favor of an employee who sought damages under ERISA against a plan trustee for an untimely delay in processing a claim. In distinguishing the Award case and Massachusetts Mutual case, the Ninth Circuit held that:

> Congress specifically provided for various kinds of recovery against a trustee, but only in favor of the plan; it also provided various express remedies for a beneficiary but not the damages sought by plaintiff Russell; employer's recovery of mistaken contributions was expressly permitted by ERISA and was for the benefit of employers. "It was there-

fore appropriate, and not inconsistent with Massachusetts Mutual to imply a remedy in favor of the employer under the doctrine of Cort v. Ash. . ." (at page 1392). Thereafter, the Supreme Court denied certiorari (Jan. 1986).

The Fourth Circuit, without specifically deciding that there is an "implied cause of action", has recognized restitution as the means for an employer such as Whitworth to obtain a refund, subject to "the traditional principles of equity which (are) applicable to such cases." Teamsters Local 639 v. Cassidy Trucking, Inc., 646 F.2d 865 (1981).

In conflict with Award Service are the holdings in: the case at bar,

Whitworth (Sixth Circuit); Crown, Cork & Seal Co. v. Teamsters Pension Fund, 549 F.Supp. 307 (E.D. Pa. 1982), affirmed mem., 720 F.2d 661 (3rd Cir. 1983); Dime Coal Company Inc. v. Combs, 796 F.2d 394 (11th Cir. 1986). District Courts have also ruled in conflict.[3]

If this Court were to hold, on Question 1, that Whitworth Bros. the employer does not have an express cause of action to recover the mistaken contributions paid on behalf of Whitworth brothers the employees, then it is submitted that the

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[3]Recognizing an implied cause of action are: E.M. Trucks, Inc. v. Central States, et al., 517 F.Supp. 1122 (1981); I.C. Ethridge v. Masonry Contractors, Inc., 536 F.Supp. 365 (1982, N.D. Ga.). Contra: Airco Industrial Gases v. Teamsters Health & Welfare Pension Fund, 618 F.Supp. 943 (D. Del. 1985), however, the Airco court allowed a federal common law action to prevent unjust enrichment.

decisions of this Court in other cases warrant a holding that such employer has an implied cause of action. The Supreme Court has decided many cases in recent terms in which plaintiffs sought an implied cause of action under a federal statute. As discussed in the Brief in Opposition, those cases are not inconsistent with finding an implied cause of action to enforce an explicit congressional remedy of return of mistakenly paid monies in § 403(c)(2)(A)(ii).

The Court has, for example, implied a cause of action in cases involving the Commodity Exchange Act (1976)[4] and Title IX Education Amendments Act (1972).[5]

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[4] Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-88 (1982).

[5] Cannon v. University of Chicago, 441 U.S. 667 (1979).

In Merrill, Lynch, defrauded investors were granted an implied right of action against a broker. This Court acknowledged a fundamental tenet of our system that for a right there must be a remedy. No less authority than Marbury v. Madison and Blackstone were cited by this Court at 456 U.S. 375:

> See, e.g., Marbury v. Madison, 1 Cranch 137, 163, 2 L.Ed. 60 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded") (quoting 3 W. Blackstone Commentaries *23).

In Cannon v. University of Chicago, where a sex discrimination action was implied, this Court said:

> "The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section." (Page 712)

In the case of Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 18 (1979) this Court held: that "the failure of congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available;" and that a private cause of action could be implied into Section 215 of the Investment Advisors Act of 1940, 15 U.S. C. § 80b-15, which declared certain contracts void, even though there was no express grant of such cause of action. The Court said:

> "In the case of § 215, we conclude that the statutory language itself fairly implies a right to specific and limited relief in a federal court. By declaring certain contracts void, § 215 by its terms necessarily contemplates that the

> issue of voidness under its criteria may be litigated somewhere. At the very least Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract. But the legal consequences of voidness are typically not so limited. A person with the power to avoid a contract may resort to a court to have the contract rescinded and to obtain restitution of consideration paid. (444 U.S. at 18)

The remedy of rescission in Transamerica is the same as the remedy of restitution in Whitworth. Both situations contemplate and require a judicial forum to give the intended remedy.

Massachusetts Mutual v. Russell[6] is instructive in that ERISA § 409 and § 502 were analyzed to show that the liability of a fiduciary is expressly "to make good to such plan", not impliedly to a

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[6] supra p. 14.

beneficiary personally. Although the Court recognized reluctance to "fine tune" the ERISA enforcement scheme, this reluctance was limited to § 409 and was commented upon by four justices in a concurring opinion. They said (at Page 3049), that the ruling was on a "single, narrow question [§ 409 appropriate relief]" and further that the legislative history of ERISA demonstrates an intent by Congress that the federal courts shall develop federal common law in construing ERISA. The Massachusetts case was concerned with creating a compensatory and punitive damage remedy not provided in ERISA. Here cross petitioner seeks to enforce an explicit remedy under ERISA § 403 (c)(2)(A)(ii).

III CONGRESSIONAL INTENT IN § 403 (c)(2)(A)(ii) WAS TO BENEFIT EMPLOYERS AND TO PREVENT UNJUST ENRICHMENT

The Cort v. Ash[7] criteria as to "implied cause of action" may be generally viewed as a search for "congressional intent". Relevant factors include: legislative history; express statutory language; compatability of implied cause of action with the purpose of the legislation; identity of the class for whose special benefit the statute was passed; the traditional role of state law in permitting the relief sought.[8] Here, § 403(c)(2)(A)(ii) expressly provides a remedy by

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[7] Cort v. Ash, 422 U.S. 66 (1975).

[8] Daily Income Fund v. Fox, 464 U.S. 523 104 S.Ct. 831 (1984).

not prohibiting plan administrators from returning mistakenly paid monies. It may be that the statute is permissive rather than mandatory in order not to impose a duty on administrators to assess the accuracy of all contributions and face liability for breach of fiduciary duty for not identifying mistakes. If the employer can not sue to prevent plan administrators from applying § 403 (c)(2)(A)(ii) arbitrarily and capriciously, there would be no state law alternative nor any other mechanism under ERISA to insure against such conduct. Further it would encourage plan administrators to try and collect money to which the plan is not entitled as here (Complaint, Paragraphs 26 and

27). Clearly, Congress did not intend for plans to be able to wrongfully take and retain money. The possibilities for abuse are clear.

Central States in its petition argues that the policy of Congress was to protect employees and that to permit an employer to recover here would jeopardize the "continued well being and security of millions of employees." In the absence of proof that the fiscal integrity of a given plan would be undermined, (estoppel could then be invoked) the plan simply refunds the mistaken monies in exchange for its release from the obligation to pay a pension. Any other result is manifest

unjust enrichment.[9] To deny recovery here would jeopardize not only the affected employers and union member owners like the Whitworth brothers, it would discourage other employers from establishing or expanding pension plans. It would create an unjust imbalance in industrial relations. The intent of Congress in enacting ERISA § 403 ("anti-inuring" statute) was to prevent corruption, insider abuse and employer-trustee impropriety. The permission to refund mistaken contributions makes clear the legislative intent to retain and imply the pre-ERISA cause of action for restitution.

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[9] Peckham v. Board of Trustees of Int'l Bro. of Painters, 719 F.2d 1093 (10th Cir. 1983).

Any contrary ruling will inhibit employers and thwart the goals of ERISA.

IV LEGISLATIVE HISTORY INDICATES CONGRESS INTENDED JUDICIAL REMEDY TO RECOVER MISTAKENLY PAID CONTRIBUTIONS

Legislative history to the 1980 amendment of § 403(c)(2)(A)(ii), (Congressional Record) states in pertinent part:

> [t]he Committees have concluded that a contribution made due to a mistake of law should be eligible for return to the employer if specified conditions are met. 126 Cong. Rec. 20208 (1980).

By saying that mistaken contributions should be returned "if specified conditions are met", Congress inplied a neutral judicial forum to determine whether the "specified conditions are met."

V DESPITE PRE-EMPTION, ERISA DOES NOT COVER EVERY QUESTION

Notwithstanding the broad pre-emption provision of ERISA,[10] it does not expressly cover every question such as the case at bar. This Court in the case of Franchise Tax Board of California v. Laborers Vacation Trust, 463 U.S. 1 (1982) recognized a state taxing agency as a plaintiff. With reference to the express remedies and persons specified in § 502(a) ERISA, the Court said:

> "ERISA contains provisions creating a series of express causes of action in favor of participants, beneficiaries and fiduciaries of ERISA-covered plans as well as the Secretary of Labor. § 502(a), 29 U.S.C. § 1132(a) . . .The phrasing of § 502(a) is instructive. Section 502(a) specifies

[10] § 514, 29 U.S.C. § 1144.

> which persons-participants, beneficiaries, fiduciaries, or the Secretary of Labor -- may bring actions for particular kinds of relief. It neither creates nor expressly denies any cause of action in favor of state governments, to enforce tax levies or for any other purpose. It does not purport to reach every question relating to plans covered by ERISA." (Pages 24-25) (emphasis added)

VI ERISA IS TO BE CONSTRUED IN LIGHT OF THE COMMON LAW OF UNJUST ENRICHMENT AND RESTITUTION

ERISA should be construed in light of the pre-existing common law. If not specifically negated or modified, the common law of trusts, contracts and restitution still applies. Central States, et al. v. Central Transport, Inc., 105 S.Ct. 2833, (1985). At issue there was Central

States' (same party as petitioner herein) right to comprehensively field audit an employer's payroll records. The majority held that such audit was permitted under the terms of the pension trust agreement and that the agreement must be construed in light of ERISA's policies. As to such policies and the common law, this Court stated at page 2840:

> "In general, trustees' responsibilities and powers under ERISA reflect Congress' policy of "assuring the equitable character" of the plans. Thus, rather than explicitly enumerating all of the powers and duties of trustees and othe fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility. Under the common law of trusts, as under the Central States trust agreements, trustees are understood to have all "such powers as are necessary or appropriate for the carrying out of the purposes of the trusts." 3 A. Scott, Law of Trusts § 186, p. 1496 (3d ed. 1967) (hereinafter Scott)...

> One of the fundamental common law duties of a trustee is to preserve and maintain trust assets, Bogert, supra § 582, at 346, and this encompasses "determin[ing] exactly what property forms the subject-matter of the trust [and] who are the beneficiaries. (emp. added)

In a separate opinion (concurring in part and dissenting in part), three justices said, while acknowledging common law concepts:

> "...the right to conduct an audit of the kind involved in this case must be granted by contract; it is not conferred by ERISA itself...But as the Court of Appeals pointed out, this broad language "does not...give the trustees carte blanche powers to undertake an audit of the records of all of [respondent's] employees. They are limited in their discretion by...the common law concept that a trustee may only act within the scope of his or her authority." (pages 2486, 2487) (underlining supplied)

Can any less be said as to the "right" of a trustee to unjustly enrich a trust

by arbitrarily and capriciously retaining someone else's property (mistakenly paid contributions)? Certainly the common law never authorized a trustee, although in the zeal of his fiduciary obligations, to misappropriate a third person's property nor to "unjustly enrich" the trust at the expense of a third party. The common law of trusts was also acknowledged in the concurring opinion of Massachusetts Mutual v. Russell, supra. (p. 17) It was noted at 105 S.Ct. 3098:

> "ERISA's legislative history also demonstrates beyond question that Congress intended to engraft trust-law principles onto the enforcement scheme. . .Thus ERISA was not so "carefully integrated" and "crafted" as to preclude further judicial delineation of appropriate rights and remedies; far from barring such a process, the statute explicitly directs that courts shall undertake it." (emphasis added)

Central States in Whitworth, as in its earlier case against Central Transport, in effect argues: "that ERISA has destroyed several hundred years of the common law of trusts, equity and restitution; that an employer can not recover mistakenly given monies; that a trustee under ERISA, although bound to explicit and exacting fiduciary duties to his beneficiary, can act less honorably, than at common law, with greater impunity vis-a-vis third persons; that ERISA, in the name of employee security, has become a shield to perpetrate common law wrongdoing in the form of "unjust Enrichment."

CONCLUSION

The Whitworth brothers, as individuals and employees, will receive no pension despite the fact that Whitworth Bros., their own corporation and legal employer, paid contributions for over 25 years. For the Central States pension fund to be relieved of any pension obligations and at the same time to arbitrarily and capriciously refuse a refund of the mistaken contributions would be unjust enrichment, and violative of Congress' intent in ERISA.

This problem is an obvious burden to small business owner-employees. They face the overwhelming costs and expenses of seeking restitution from recalcitrant trustees who, in effect, use the busi-

ness owners mistakenly contributed funds to legally oppose their refund.

By this Court's review of this entire problem area, a serious conflict in the Circuits can be resolved. It is respectfully submitted that such resolution can be had by finding an express remedy to Whitworth Bros., the employer, as a participant, under ERISA § 502.

Alternatively, this Court can follow the principles established in its many decided relevant cases on "implied remedy." The Court can recognize the Congress' intent to retain the right and to recognize the remedy of restitution to prevent unjust enrichment, under ERISA § 403(c)(2)(A)(ii).

For all the above reasons the Cross Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

As amended (by section 410 of MPPAA, 94 Stat. at 1308), ERISA § 403(c)(2)(A) provides:

> "In the case of a contribution, or payment of withdrawal liability under part 1 subtitle E of part iv--
>
> (i) made by the employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and
>
> (ii) made by an employer to a multiemployer plan by a mistake of fact of law (other than a mistake to whether the plan is described in section 401(a) of the Internal Revenue Code of 1954 or the trust which is part of such plan is exempt from taxation under section 501(a) of such Code), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake."

It is codified at 29 U.S.C. Section 1103 (c)(2)(A).

Additionally, ERISA Section 502(a), 29 U.S.C. Section 1132(a), provides:

"(a) A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of this plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

> (4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 105(c);
>
> (5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate relief (i) to redress such violation or (ii) to enforce any provision of this title; or
>
> (6) by the Secretary to collect any civil penalty under subsection (i)."

In pertinent part, 29 U.S.C. § 1002 provides:

> For purposes of this subchapter:
>
> (7) the term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

> (8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

ERISA section 502(e)(1), 29 U.S.C. section 1132(e)(1), provides:

> "Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

No. 86-666

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WHITWORTH BROS. STORAGE COMPANY,
Cross-Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CROSS-RESPONDENTS' BRIEF IN RESPONSE

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QUESTIONS PRESENTED FOR REVIEW

1. Within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.*, can an "employer" ever be a "participant" and thus entitled to bring an action under ERISA § 502(a), 29 U.S.C. § 1132(a)?

2. Did Congress in § 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii), imply that an employer may bring an action for restitution of contributions made, allegedly by mistake, to an ERISA-governed multiemployer employee benefit plan?

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CROSS-RESPONDENTS' BRIEF IN RESPONSE

The cross-respondents Central States, Southeast and Southwest Areas Pension Fund ("the Pension Fund"), the Pension Fund's Board of Trustees and Executive Director (all cross-respondents hereinafter collectively "Central States") respectfully submit this Brief in Response to the Cross-Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

On September 15, 1983, Whitworth Bros. Storage Company ("Whitworth") filed a complaint against Central States seeking a refund of certain contributions made, allegedly by

mistake, by Whitworth to the Pension Fund and a declaratory judgment that unpaid contributions were not owed by Whitworth. Specifically, Count I of the complaint alleged a right pursuant to § 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii), to recover contributions made by Whitworth to the Pension Fund on behalf of William Whitworth and Ernest Whitworth after the effective date of ERISA; Count II was an allegedly pendent state-law claim for restitution of Whitworth's contributions for William Whitworth and Ernest Whitworth prior to the effective date of ERISA; Count III sought a declaratory judgment pursuant to 28 U.S.C. § 2201 that Ernest Whitworth is not covered by the collective bargaining agreement providing for contributions to the Pension Fund, that Whitworth is entitled to restitution plus interest of the payments made on Ernest Whitworth's behalf, and that Central States is not entitled to recover the unpaid contributions.

On November 6, 1984, Central States filed a motion, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the complaint for lack of subject-matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted. The "facts" to be considered upon such a motion, and upon review of a decision granting such a motion, are the factual allegations pleaded in the complaint. The following relevant factual allegations from the complaint (some of which Central States denies, but which for the purposes of review must be deemed to be true), therefore, are the "facts" in this case:

> Plaintiff is and was, at all relevant times herein, a corporation duly organized and existing under the laws of the State of Ohio. (Complaint at ¶ 1)
>
> The Defendant Central States, Southeast and Southwest Areas Pension Fund (hereafter Central States or Pension Fund) is an employee benefit plan and multiemployer plan, as defined in 29 U.S.C. § 1002(2), (3) and (37)(A), established and maintained by "employers" engaged in "commerce" and in an "industry and activity

affecting commerce", and by an "employee organization" representing employees engaged in "commerce" and in an "industry and activity affecting commerce", within the meaning of 29 U.S.C. §§ 1002(4), (5), (11), (12) and 1003(a). Defendant Central States has maintained a Pension Fund for the benefit of Teamsters Union members from 1955 to the present. (Complaint at ¶ 2)

From 1955 to the present, William Whitworth was and is a co-owner, employee and officer (with authority to hire and fire employees) of Plaintiff Whitworth Bros. Storage Company. From 1955 to the present, Ernest Whitworth was and is a co-owner, employee and officer (with authority to recommend hiring and firing employees) of Plaintiff Whitworth Bros. Storage Company. (Complaint at ¶ 6)

Plaintiff made employer contributions to Central States for William Whitworth from January 1, 1975 through March, 1980, and for Ernest Whitworth from January 1, 1975 through July, 1981 in the mistaken belief that William Whitworth and Ernest Whitworth were employees covered by the collective bargaining agreement. The amount of said contributions is approximately $11,000.00. (Complaint at ¶ 10)

Plaintiff demanded recovery of such contributions to Central States. (Complaint at ¶ 11)

On July 23, 1981, Defendant Board of Trustees denied Plaintiff's request for recovery of erroneous contributions made on behalf of William Whitworth from January 1, 1975 through November 10, 1979. On July 24, 1981, Defendant Board of Trustees approved Plaintiff's request for recovery of erroneous contributions made on behalf of William Whitworth from November 11, 1979 through March 1, 1980. (Complaint ¶ 12)

From 1955 through December 31, 1974, Plaintiff made contributions to Central States for William Whit-

worth and Ernest Whitworth in the mistaken belief that William Whitworth and Ernest Whitworth were employees covered by the collective bargaining agreement. The amount of such contributions is approximately $9,000.00. (Complaint at ¶ 19)

Plaintiff has demanded recovery from Defendants of the erroneous payments for this period, but Defendant Board of Trustees has refused to review Plaintiff's claim for erroneous contributions from 1955 through May 30, 1964. On July 23, 1981, Defendant Board of Trustees denied Plaintiff's claim for recovery of erroneous contributions made on behalf of William Whitworth from May 31, 1964 through December 31, 1974. (Complaint at ¶ 20)

From August, 1981 through May, 1983, Defendant Central States billed Plaintiff in the amount of $1,701.86 purportedly for Plaintiff's employee's contribution for Ernest Whitworth. Plaintiff has refused to pay Central States because Ernest Whitworth is not covered by the collective bargaining agreement. (Complaint at ¶ 26)

After briefing on the motion was complete, the district court filed a memorandum and order on January 15, 1985, stating that "Jurisdiction is predicated on 28 U.S.C. § 1331 and 29 U.S.C. § 1132e(1) [sic: (e)(1)] and (f)," noting that "[t]he issue in the case at bar is whether an employer may bring an action to recover overpayments to a pension fund," concluding that "employers have no cause of action," and therefore dismissing the counts alleging federal claims for lack of jurisdiction over the subject matter, and the pendent state-law claim as a matter of discretion. Pursuant to that memorandum and order, the complaint was dismissed on January 22, 1985.

On February 1, 1985, Whitworth filed a motion for reconsideration and to alter or amend the judgment as well as a motion for leave to file a first amended complaint. After the completion of briefing on these motions, the district court

filed a memorandum and order denying both motions on March 11, 1985.

Whitworth filed a notice of appeal to the Court of Appeals for the Sixth Circuit on March 26, 1985. After briefing and oral argument, the court of appeals filed its opinion on June 25, 1986. In that opinion, the Sixth Circuit considered "whether the district court had jurisdiction of such a claim [by an employer for restitution of contributions made, allegedly by mistake, to an employee benefit plan] based on (1) the express actions recognized in ERISA; (2) an action implied from the terms of the statute; or (3) an action arising under federal common law." 794 F.2d at 224. The court of appeals answered the first two of these questions in the negative, holding that "section 502 is an exclusive grant of jurisdiction, and that ERISA does not expressly provide for an action by an employer against a fund for a refund of contributions," and that an employer has "no implied right of action pursuant to section 403." *Id.* at 228, 233. The Sixth Circuit went on, however, to characterize Whitworth's restitution claim as a "contract claim" and to hold that such a claim is governed by federal law because ERISA § 514(a), 29 U.S.C. § 1144(a), preempts state law relating to employee benefit plans and because the legislative history of ERISA indicates a congressional intent to develop a federal common law of such plans. *Id.* at 233-235. Based upon this holding, the court of appeals concluded that Whitworth's action for restitution is governed by federal common law and "arises under" federal law for the jurisdictional purposes of 28 U.S.C. § 1331. *Id.* at 236.

ARGUMENT

The first question presented by Whitworth was neither raised nor considered in either of the courts below. This Court ordinarily does not decide questions presented under such circumstances. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). Moreover, Whitworth's assertion that an "employer" should be considered a "participant" for the purpose of bringing suit under ERISA § 502(a), 29 U.S.C. § 1132(a), is completely without merit. Whitworth has been unable to cite any case in favor of this proposition and thus bases its argument upon the assertion that "the employer is suing on behalf of the employees for whom it contributes money to obtain for them the benefit of the return of money to which they are entitled." Cross-Petition at pages 12-13. However, such a representational relationship between an employer and its employees can hardly be deemed typical[1]; moreover, no such relationship was alleged in the complaint in the present case.

In any event, an examination of ERISA's relevant definitions, which Whitworth failed to mention in its argument, demonstrates that Whitworth cannot be a participant.

> The term "participant" means any employee or former *employee of an employer*, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an

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[1] Analysis of the suggestion that an employee benefit plan should "simply refund[] the mistaken monies in exchange for its release from the obligation to pay a pension," Cross-Petition at page 28, illustrates the invalidity—and, in fact, the danger—of Whitworth's argument when applied to normal circumstances where there is not an identity between an employer's owners and its employees. The suggested refund would be made to an *employer*, while any entitlement to a pension is that of an *employee*. Apparently Whitworth either believes that the suggested release would eliminate such an entitlement, or else that employees will waive their pension rights for the benefit of their employers; the latter is, of course, sheer speculation that runs contrary to common sense and experience, and the former is contrary to law.

> employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

ERISA § 3(7), 29 U.S.C. § 1002(7) (emphasis added). An "employee" is defined as "any *individual* employed by an employer," ERISA § 3(6), 29 U.S.C. § 1002(6) (emphasis added); thus a corporate employer such as Whitworth can never be considered as a participant.[2]

With regard to the second question, Central States acknowledges that a conflict of decisions exists among the federal judicial circuits on the issue of whether an employer has an implied right of action under ERISA § 403(c)(2)(A)(ii)[3]. Indeed, in footnote 2 of its Petition for a Writ of Certiorari in the present case, Central States pointed out that conflict. Even though this issue was not the basis of the Sixth Circuit's decision in the present case, Central States would not object to this Court's review of Whitworth's second question in conjunction with a review of the question presented by Central States in its Petition in Case No. 86-481 — whether an employee has a federal-common-law action for restitution of contributions made, allegedly by mistake, to an ERISA-governed employee benefit plan — which was the basis for the decision below. Central States maintains, however, that Whitworth's position on the merits of its second question is without merit for the reasons stated by the Sixth Circuit in Section II.B. of its opinion in the present case.

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[2] ERISA § 3(5), 29 U.S.C. § 1002(5), defines the term "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

[3] Whitworth either confuses or simply misstates the issue when it argues that a cause of action should be implied because "§ 403(c)(2)(A)(ii) expressly provides a remedy. . . ." Cross-Petition at page 26; *see also* pages 21 and 25.

Respectfully submitted,

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